No. 82-1066

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY PTASYNSKI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

REPLY BRIEF FOR THE UNITED STATES

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I. THE WINDFALL PROFIT TAX DOES NOT VIOLATE THE UNIFORMITY CLAUSE OF THE CONSTITUTION

1. In urging that the windfall profit tax violates the Uniformity Clause of the Constitution because of Congress' exclusion of certain geographically defined categories of Alaskan oil, appellees' argument rests upon two fundamental errors. First, they mistakenly assume that the windfall profit tax is levied on all domestic oil production. That, however, is not the case. Congress has imposed the tax only upon the windfall profits accruing from the decontrol of domestic oil prices and has defined windfall profit in a manner designed to encourage the continued exploration for and development of domestic oil.

Second, they erroneously assume that the Uniformity Clause absolutely prohibits Congress from defining the subject of a tax (or tax exemptions) in a manner that explicitly takes geographic considerations into account. But there is no basis in the decisions of this Court for the inflexible interpretation of the Uniformity Clause advanced by appellees. Article I, Section 8, Clause 1 prescribes that "Duties, Imposts and Excises shall be uniform throughout the United States." It was established, however, at the very outset that the Uniformity Clause does not prohibit Congress from drawing tax classifications that recognize that the subject of the tax may exist only within particular geographic areas. Thus, in the *Head Money Cases*, 112 U.S. 580 (1884), the analysis of which was most recently reaffirmed in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974), the Court upheld a tax on companies transporting foreign passengers entering the United States by vessel. In so ruling, the Court rejected the contention that the tax violated the Uniformity Clause because by its terms, it could apply only in states having sea ports and not in landlocked states. The Court noted that "the evil to be remedied by this legislation" did not exist on the inland borders, and that "substantial uniformity within the meaning and purpose of the Constitution" was achieved by the uniform application of the statute in those quarters in which that "evil" was found to exist. 112 U.S. at 595.

The rationale of the *Head Money Cases* would not be changed by an attempt to portray the tax in that case as "the result of actions by a combination of states [the landlocked states] which strike at the vital interests of a minority of states [the coastal states]" (Ass'n Br. 10; see also Taxpayer Br. 20). The Uni-

formity Clause does not countermand the principle that majorities (however constituted), rather than minorities, are to prevail in the legislative process. So long as all persons similarly situated with respect to the subject of a federal tax are similarly treated, regardless of geographic location, the Uniformity Clause is satisfied.[1]

Here, the subject of the tax in question is the windfall profit accruing to oil producers as a result of the decontrol of domestic oil prices. In structuring the tax, Congress established a system of three tiers which was designed to encourage new oil production by taxing "newly discovered oil" at the most favorable rate. Conversely, Congress determined that the windfall profit would be greatest with respect to certain categories of old oil, where the producer would stand to gain a "windfall" from the sudden increase in prices caused by decontrol. Finally, in enacting the tax, Congress concluded that no windfall profit would accrue to the producers of oil located within certain geographically-defined areas on the "North Slope" of Alaska, and offshore oil that might be located on the Outer Continental Shelf adjacent to the North Slope. As the legislative history makes clear, the basis for Congress' conclusion is undisputed, viz., that the remote location, fragile environment, and extreme climatic conditions subjected the production of North Slope oil to risks and costs far greater than the

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[1] Similarly, even if the association appellees (Br. 13) and taxpayer appellees (Br. 32-33) are correct in describing the role of Senator Stevens of Alaska in permitting consideration of the bill (see pp. 14-15, *infra*), there is no impropriety in a Senator's efforts to persuade his colleagues that differences in circumstances exist within his state that warrant a difference in tax treatment.

risks and costs of developing domestic oil properties elsewhere. Thus, in determining that no windfall profit would occur with respect to North Slope oil, Congress sought to encourage continued oil exploration in these then-undeveloped areas.[2]

Viewed in this perspective, it is clear that the windfall profit tax meets the standard of the *Head Money Cases*, *supra*, 112 U.S. at 594, that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." Here, the subject of the tax is windfall profit, and Congress has taxed such profits in every place where it has determined them to exist. However, its study of the domestic oil industry led it to conclude that there would be no windfall profit from oil production on the North Slope of Alaska. Indeed, the three-tier system established by the statute demonstrates that Congress believed that windfall profits would exist in varying amounts and degrees depending upon the particular type of oil sold. Hence, the exclusion of certain geographically-defined categories of Alaskan oil is equivalent to the creation of a "fourth tier" of oil that falls outside the compass of the windfall profit levy because of the absence of windfall profits.[3]

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[2] Despite the title of the tax and the extensive legislative history described in our opening brief (at 18-23), appellees argue (Ass'n Br. 2, 22; Taxpayer Br. 1 n.1) that the windfall profit tax is unrelated to profits. But Congress reasonably assumed that the increase in prices caused by decontrol would constitute profits. See also Section 4988(b) (26 U.S.C.), which limits the tax to an amount not exceeding 90% of the net income attributable to the oil in question.

[3] *Downes* v. *Bidwell*, 182 U.S. 244 (1901), upon which appellees rely (Taxpayer Br. 14), is distinguishable. There, the Court upheld a duty upon the importation of all goods from Puerto Rico. Although it appears that the Court re-

2. In exempting North Slope oil from the windfall profit tax, Congress did not, as appellees contend (Ass'n Br. 5, 8, 21; Taxpayer Br. 2, 7, 10, 21), "entirely exempt" three-fourths of the land area of Alaska from a tax that is imposed elsewhere. Such a characterization is misleading given the fact that there is no oil production whatsoever in the vast majority of the land within the geographically defined exempt area of Alaska. Moreover, as we pointed out in our opening brief (at 20-23), the bulk of Alaskan oil production within the exempt area is Sadlerochit oil, which is taxed at the highest rate provided for by the statute. Thus, the exemption applies only to "newly discovered oil" that might be produced within the designated area.[4] Hence, the fact that a substan-

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garded such a tax as not uniform insofar as it applied only to goods imported from Puerto Rico, the Court sustained the tax on the ground that Puerto Rico was not part of the United States. Here, however, the tax is not levied on all goods (or even any commodity) from a particular region nor does it exempt all goods (or any commodity) from a particular region. To the contrary, the tax is levied in every place throughout the United States in which Congress has determined that windfall profits would result from decontrol of domestic oil prices. Hence, the tax is uniform within the meaning of the Uniformity Clause.

[4] As the amicus brief filed by the State of Alaska points out (at 5), exempt production from the Kuparuk field is now approximately 100,000 barrels per day. In marked contrast, the daily production of taxable Sadlerochit oil is currently 1,530,000 barrels, and that production alone exceeds the production of any other state except Texas. Only about five percent of Alaska's total production is exempt under the provisions here in question (*id.* at 7). There is a long lead time required to develop any newly discovered areas. For example, 12 years had elapsed from the time oil was discovered in the

tial portion of the overall tax liability is imposed on Alaskan production effectively refutes appellees' charge that the exemption at issue represents the regional favoritism that the Founders sought to prevent by the Uniformity Clause. Indeed, the fact that the overwhelming portion of Alaskan production bears a substantial windfall profit tax liability convincingly demonstrates that the tax is imposed only on windfall profits and that it is uniformly applied with respect to every place where Congress determined such windfall profits to exist.

Accordingly, we have no quarrel with the taxpayer appellees' characterization (Br. 12) that the Uniformity Clause requires Congress to consider excise tax issues in terms of "policy rather than naked political power." In seeking to tax windfall profits arising from decontrol while continuing to encourage domestic oil production, Congress has done just that, viz., it has framed the definition of windfall profits in a manner designed to implement the national oil policy of taxing windfall profits arising from decontrol while encouraging new oil exploration and development. Nothing in the Uniformity Clause limits Congress' authority to define windfall profit arising from decontrol realistically and in a manner that seeks to promote the continued exploration and development of new oil sources.

Kuparuk field until Atlantic Richfield began commercial production in December 1981. Thus, although there are certain small formations that may go into production in the future within the exempt area, it is not likely that any additional "newly discovered oil" in the exempt area of Alaska will go into production before the windfall profit tax is phased out pursuant to Section 4990 of the Internal Revenue Code of 1954 (26 U.S.C.).

Indeed, the very legislative materials discussed by the taxpayer appellees (Br. 18-33), in arguing that the exemption too importantly serves the congressional purpose to be severable, show that the exemption fits logically into a unified decontrol scheme designed by Congress as a careful blend of energy and revenue policies. Decontrol of domestic oil prices was intended both to alleviate market distortion caused by the disparity between the controlled domestic prices and world prices and to encourage additional oil exploration and development. As a quid pro quo for decontrol, the windfall profit that would result was to be taxed (although not entirely eliminated) in accordance with a scheme carefully tiered to serve the dual purpose of identifying the windfall with as much precision as possible and, concomitantly, not discouraging further exploration and development.[5] This herculean effort by Congress to deal as consistently as practicable, in achieving these objectives, with the myriad circumstances existing in the oil industry is fully consistent with, and indeed painstakingly serves the policies of, the Uniformity Clause.

[5] While objecting to Congress' explicit reference to geography in defining the "fourth tier" (the exemption), taxpayer appellees nevertheless argue (Br. 13) that Congress "readily * * * could achieve such legitimate ends * * * by providing exceptions framed in terms of severe climate, high production costs, or other relevant factual variables." Nowhere do appellees show that Congress could not validly achieve precisely the same result by using draftsmanship more to appellees' liking. There was no showing here, any more than there was before Congress, that the "relevant factual variables" that led Congress to adopt the provisions at issue exist anywhere else within the United States. Thus, there has been no showing that Congress has enacted a tax prohibited by the Uniformity Clause—which is a limitation on the taxes Congress may impose, rather than a prescription of statutory draftsmanship requirements.

II. THE WINDFALL PROFIT TAX OPERATED WITH ABSOLUTE GEOGRAPHIC UNIFORMITY AS TO ALL DOMESTIC OIL PRODUCTION DURING THE TAXABLE PERIODS IN SUIT

As we pointed out in our opening brief (at 40-43), the windfall profit tax operated with absolute geographic uniformity as to all categories of domestic oil production during the taxable periods in question in this suit. This proposition derives from the undisputed fact that there was no production of any oil that was actually exempt from tax under the "exempt Alaskan oil" provision until December 1981, almost one full year after the end of the last period covered by any of the refund claims in this case (J.A. 22, 26, 29, 31, 68, 71). Hence, even assuming arguendo that appellees are correct that the Uniformity Clause bars the exclusion for exempt Alaskan oil, they are not entitled to the refunds they seek.[6]

In response, appellees urge (Taxpayer Br. 24-26) that the absence of exempt Alaskan production during the periods in suit does not bar their recovery of refunds because the very prospect of the Alaska exemption diminished the relative value of their investment

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[6] Contrary to appellees' suggestion (Taxpayer Br. 24 n.26), we do not advance this alternative jurisdictional argument in order to postpone a decision on the merits, but because the amount of taxes at stake for this initial period is itself very substantial. The total windfall profit tax revenues collected for periods prior to January 1982 (the date when oil production commenced in the exempt area of Alaska) are more than $35 billion. See Internal Revenue Service, *Statistics of Income Bulletin* 41-42 (Fall 1982). Although the first barrel of exempt Alaskan oil was produced on December 14, 1981 (J.A. 53), the $35 billion figure includes the relatively small amount of revenues collected for the 17-day period December 14-31, 1981.

in oil fields outside the exempt area of Alaska and thereby operated to their competitive disadvantage. But apart from the fact that there is no proof that the Alaskan exemption provisions had such a negative effect upon the value of oil investments elsewhere, appellees' objections are legally insufficient. Let us suppose that Congress made the Alaska exemption effective as of January 1, 1982. In such a case appellees could make the same objection that the future operation of the exemption diminished the value of oil fields outside Alaska. Presumably, Louisiana would likewise urge that the "facial invalidity" (Br. 25) of the Alaskan exemption was a sufficient basis for adjudication of the case. Under those circumstances, however, it would be abundantly clear that appellees could not claim any injury and therefore would not be entitled to refunds because the statute would have operated with absolute geographic uniformity for the taxable periods in suit. Simply put, the potential future effectiveness of the Alaskan exemption would be irrelevant for the period in which it did not apply. Here, too, the same result should govern where, as a factual matter, the tax operated with absolute geographic uniformity. The critical consideration in this case is that the only statutory basis for the district court's jurisdiction is 28 U.S.C. 1346(a)(1)—under which it could award a refund for taxes illegally assessed and collected for the particular periods in suit. See 26 U.S.C. 7422(a). Since there was no exempt Alaskan oil production during the periods in suit, appellees are not entitled to the refunds for the taxes paid for those periods.

III. EVEN IF THE EXEMPTION OF CERTAIN CATEGORIES OF ALASKAN OIL VIOLATES THE UNIFORMITY CLAUSE, THE REMAINING PROVISIONS OF THE WINDFALL PROFIT TAX ARE SEPARABLE AND SHOULD BE UPHELD

In our opening brief (at 43-51), we argued that assuming that the exemption provisions of Sections 4991(b)(3) and 4994(e) violate the Uniformity Clause (even for periods prior to December 1981), the district court should have applied the separability clause of Section 7852(a) of the Internal Revenue Code of 1954 and upheld the remaining provisions of the Act, or at the very least, the tax as it applies to all categories other than "newly discovered oil." Such a disposition would implement Congress' intent to preserve the revenue by including a separability clause in the Internal Revenue Code to which the windfall profit tax provisions were added.

Appellees, however, resist such an outcome to their challenge of the Alaskan exemption. Starting from the undisputed premise that "[c]ongressional intent controls" (Taxpayer Br. 27), they argue that the Alaskan exemption provisions were such a critical portion of the Act, that Congress would not have imposed the windfall profit tax without the Alaskan provisions. Hence, they argue that the alleged defects of the Alaskan exemption requires the invalidation of the entire statute as it applies to all taxable categories.

But the intent of Congress was precisely to the contrary. As we pointed out in our opening brief (at 45-46), Congress understood that in the event the Alaskan exemption provisions were declared invalid,

the separability provision of Section 7852(a) would apply to save the remaining provisions of the Act.[7] Indeed, during the debate on the tax, Senator Long, the Chairman of the Finance Committee and the floor manager of the bill in the Senate, expressly reassured the Senate on this point, in terms that bear repetition here (126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980))—

> It is our thought that there is a separability clause in the Internal Revenue Code which applies to everything in the code and to all amendments to it, and we would expect and we would intend, if the courts should find a constitutional objection valid with respect to the Alaskan oil exemption, that the Alaskan oil exemption should not stand and that Alaskans or those producing oil in Alaska would have to pay the same 30 percent tax on new oil that everybody else would have to pay.

As Senator Long pointed out to the Senate, his reassurance as to severability was supported by an opinion of the Office of Legislative Counsel, which was printed in the Congressional Record by unanimous consent. *Id.* at S3056-S3057. In these circumstances, it is clear that Congress intended the separability clause of Section 7852(a) to apply in the event it was necessary to save the remaining provisions of the

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[7] Hence, *Zobel* v. *Williams*, No. 80-1146 (June 14, 1982), upon which the taxpayer appellees rely (Br. 8, 27), is distinguishable. There, the statute in question contained a specific proviso that the entire Act should fall, if any of its provisions were held invalid. Nor is *Davis* v. *Wallace*, 257 U.S. 478 (1922), cited by Texas (Br. 27) and Louisiana (Br. 40), pertinent. Unlike the instant case, there was no indication whether the legislature there intended that a class given preferential treatment should be taxed on the same basis as other taxpayers if the preference were held invalid.

windfall profit tax. See Brief Amicus Curiae, Rep. Silvio O. Conte 10-12.

Appellees concede that no contrary views were expressed as to the applicability or operation of Section 7852(a) by any proponent or opponent of this legislation in either the House or the Senate. They nevertheless suggest that Senator Long's statement should be disregarded because it is entitled to less weight than views set forth in committee reports (Taxpayer Br. 33-34), that the "exempt Alaskan oil" provisions were of such overriding importance to Congress that the tax would not have been enacted without the exemption (*id.* at 28-31) and that, at all events, Congress would have been unable to enact any tax at all had Senator Stevens' opposition to the bill not been overcome by offering the compromise amendment providing for the Alaskan exemption in the Senate bill (*id.* at 31-32).

But the authoritative force of Senator Long's statement as to separability was in no way contradicted by the various committee reports. The sequence of events shows that the questions regarding the possibility that the Alaskan exemption would violate the Uniformity Clause were not raised until after those reports were issued. Thus, the floor debate offers the only direct evidence of Congress' intent on this question. While there was no "debate" as such on this point, the undisputed fact is that no member of Congress rose to challenge, or even question, Senator Long's conclusion that the tax would be applied to all Alaskan production in the event the exemption would be held invalid. His statement simply put to rest the questions that had been raised on this subject. The plain inference is that Senator Long satisfied Congress that the separability clause would apply.[8] It is

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[8] Given the reservations expressed by several Senators as to the validity of the Alaskan exemption and Senator Long's

that evidence that constitutes the congressional intent that appellees acknowledge to be the "controlling principle" governing separability.[9]

Moreover, we do not quarrel with the fact that the Alaskan exemption provisions were of considerable importance to Congress. There is no doubt that Congress was concerned that the general imposition of a windfall profit tax with respect to newly discovered oil could have a deterrent effect on future discovery and development, particularly in the case of new Alaskan oil. But the main purpose of the tax was to raise revenue from the windfall profits that Congress determined would accrue from the decontrol of domestic oil prices. There is no evidence in the legislative history that Congress would have foregone the entire tax and the $227.3 billion in revenue it was estimated to produce over a 12-16 year period, if it could not have provided an exemption for North Slope Alaskan oil—a matter of far less magnitude in the context of the overall revenue package.

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reassurance, there is no basis for the taxpayer appellees' claim (Br. 41-42) that taxpayers presently benefitting from the Alaskan exemption would be "unfair[ly] surprise[d]" by a decision subjecting them to the tax and that such a disposition would pose "serious Constitutional problems." See *United States* v. *Darusmont*, 449 U.S. 292 (1981).

[9] Appellees also argue (Taxpayer Br. 5, 34 n.48) that Senator Long's statement during the legislative debate is not authoritative because he has subsequently altered his views as to the wisdom of the windfall profit tax. But such subsequent statements have no bearing whatsoever upon the intent of Congress in enacting these provisions. *Toner* v. *Commissioner*, 629 F.2d 899, 902 (3d Cir. 1980), cert. denied, 450 U.S. 916 (1981); *Patzkowski* v. *United States*, 576 F.2d 134, 136 n.2 (8th Cir. 1978); *Aparacor, Inc.* v. *United States*, 571 F.2d 552, 556 (Ct. Cl. 1978).

Finally, there is no basis for the taxpayer appellees' contention that the exemption was the price for Senator Stevens' support for the tax because he was in a position to thwart, single-handedly, the substantial majority that favored the adoption of the measure from even bringing the bill to a vote. Indeed, such arguments would be equally applicable to severability questions regarding virtually any statute that was at all controversial at the time of its enactment. The question is not what might have happened if the bill's opponents had resorted to parliamentary delaying tactics, but what was the intent of the majority approving the bill.[10] That intent, we submit, was premised on the assumption that the Alaskan exemption was subject to the separability clause of Section

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[10] The taxpayer appellees repeatedly assert (Br. 8, 31-33) that the exemption was, in some fashion, the price exacted by opponents of the tax for permitting the Act to come to a vote. But if the political bargains underlying the Act are at all germane, the legislative record makes clear that the primary bargain was the enactment of the windfall profit tax in exchange for decontrol of oil prices. See H.R. Rep. No. 96-304, 96th Cong., 1st Sess. 4, 7 (1979); S. Rep. No. 96-394, 96th Cong., 1st Sess. 6-7 (1979). Indeed, the *quid pro quo* between price decontrol and the tax is supported by explicit statements by members of Congress. See remarks of Rep. Jones (Oklahoma) ("I recognize fully that in order to get decontrol of oil some kind of tax will have to be imposed. That is the political price of decontrol."); Rep. Michel (Illinois) ("practical politics dictates the tax in order to get decontrol"); Rep. Brown (Ohio) ("if this bill does not pass, this conference effort, we will have the possibility of the President * * * re-regulating oil in this country"), 126 Cong. Rec. H1844-H1846 (daily ed. Mar. 13, 1980). Ironically, appellees' solution to strike down the windfall profit tax in its entirety would leave oil producers with all of the benefits of decontrol without the burdens of the tax on the ensuing windfall profits that Congress clearly intended to impose.

7852(a) of the 1954 Code. Hence, Congress intended that the tax would remain fully applicable to the appellees regardless of the merits of their Uniformity Clause contention.[11]

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[11] *Marchetti* v. *United States*, 390 U.S. 39 (1968), upon which the taxpayer appellees rely (Br. 42-43), does not support their contention that this Court has no alternative but to strike down the tax in its entirety if it agrees with their contention that Alaskan exemption provisions violate the Uniformity Clause. There, the Court held that federal wagering taxes could not be criminally enforced on the ground that to do so would violate the Fifth Amendment privilege against self-incrimination of those subject to the tax. While it declined to prescribe additional rules that would preclude the government from using information provided by taxpayers subject to those taxes for criminal prosecution purposes or from sharing such information with the states, the Court noted that it was not holding the taxes themselves invalid. 390 U.S. at 61; see also *United States* v. *United States Coin & Currency*, 401 U.S. 715, 717 (1971). Thus, *Marchetti* in fact supports our position that if a statute is constitutionally defective, the courts need not invalidate the enactment as a whole. To the contrary, the remedy need go no further than necessary to remove the defect.

While taxpayer appellees suggest at one point that the prospect of merely eliminating the Alaskan exemption would have chilled their incentive to sue (Br. 36), that is flatly inconsistent with their argument (Br. 24-26) that the mere existence of the as-yet-unused exemption during the taxable years in issue operated to their competitive disadvantage. Hence, no danger to the preservation of incentive to sue is posed in this case by our contention that the exemption is severable—even if that would be a pertinent consideration in some other context. Cf. *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 489 (1982).

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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